RANHILL BERSEKUTU SDN BHD

v.

SAFEGE CONSULTING ENGINEERS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING MOTION NO: R1-25-29-2003]
3 NOVEMBER 2003

ARBITRATION: *Arbitrator - Application to set aside orders of arbitrator - Whether arbitrator's orders merely interlocutory and procedural rulings - Whether there were grounds to set aside orders due to arbitrator's alleged misconduct - Whether orders contrary to order of High Court - Whether there were errors of law on face of orders resulting in miscarriage of justice - Whether application should be granted*

This was an application by the plaintiff for the following orders that: (i) the order for directions by the arbitrator dealing with the issue of contribution of appointment of liability be set aside pursuant to s. 24(2) of the Arbitration Act 1952 (Revised 1972) ('the Act'); and (ii) the further order for directions by the arbitrator dealing with the first order be set aside pursuant to s. 24(2) of the Act. The plaintiff and the first defendant were consulting engineers whose professional services had been engaged by the second defendant pursuant to an agreement for consulting services. The plaintiff and first defendant agreed that they would be jointly and severally liable to the second defendant, and the parties agreed to refer any dispute, which subsequently did arise between the parties, to arbitration.

During arbitration proceedings, the plaintiff served a notice on the first defendant claiming contribution and/or indemnity in respect of the sums claimed by the second defendant. By an order of court dated 10 January 2003 ('the said court order'), it was declared that the arbitrator had jurisdiction to decide on the issue of contribution and/or indemnity between the plaintiff and the first defendant. The arbitrator directed, *inter alia*, that the issue of contribution would be heard after an award had been made in favour of the second defendant and that the supplementary submissions and evidence on the issue of contribution may be given at the same hearing ('the first order'). The plaintiff objected to the first order, but the arbitrator, after considering the plaintiff's submissions, decided to maintain the same directions ('the second order'). The plaintiff contended that the arbitrator had misconducted himself in making and publishing the first and second orders.

Held:

[1] The two orders were not awards but merely directions or interlocutory rulings which specified the order in which the issue of contribution had to be decided in the arbitration and, therefore, were not susceptible to being set aside. In the present case, since the issue of contribution would only arise if there were a finding of liability against the plaintiff and the first defendant, it stood to reason that the issue should be reserved until there was a finding of liability, and its extent, against the plaintiff and the first defendant. The two orders were procedural rulings; thus, the arbitrator had complete and unfettered discretion in the matter, and this court had no jurisdiction to supervise at all. (pp 349 g & 350 d & h)

[2] Even if the first and second orders were not procedural directions but awards, there were no grounds for setting them aside. The High Court's jurisdiction under s. 24(2) of the Act for setting aside an arbitrator's award for misconduct is very limited and only to be exercised sparingly, that is, as such in the event of a miscarriage of justice in which there is a failure to observe the rules of natural justice or an appearance of bias, partiality, illegality or dishonesty. None of these circumstances justified setting aside the two orders in this case. (pp 351 f & 352 e)

[3] The directions of the arbitrator were not contrary to the said court order as it only declared that the arbitration was vested with the jurisdiction to decide the issue of contribution between the plaintiff and the first defendant. It did not specify in what order or manner the issue of contribution must be decided in the arbitration. (p 352 g-h)

[4] This court was unable to agree with the plaintiff's allegations that there were errors of law appearing on the face of the two orders resulting in a miscarriage of justice by the arbitrator in holding two separate proceedings and delivering two awards. Whilst the plaintiff alleged that the arbitrator had misconducted the proceedings and declined jurisdiction, the plaintiff had not shown that the impugned order had in any way prejudiced the plaintiff's case or caused the plaintiff any injustice. (p 353 h)

[5] It is well settled that the court's general approach to arbitrations is a "hands-off attitude unless there has been something radically wrong and vicious in the proceeding". The court will not review the arbitrator's discretion provided that he acts within his authority and according to the principles of justice. On the facts of this case and for the aforesaid reasons, the orders sought by the plaintiff could not be granted. (p 354 a-c)

[Application dismissed.]

Case(s) referred to:
Bremer Vulkan v. South India Shipping Corporation [1981] 1 All ER 289 ***(refd)***
Chamsey Bhara Co v. The Jivray Ballou Spinning & Weaving Co Ltd [1923] AIR PC 66 ***(refd)***
Dato' Samsuddin Abu Hassan v. Robert Kokshoorn [2003] 3 CLJ 1 CA ***(foll)***
Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd [2003] 1 CLJ 103 CA ***(foll)***
Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(foll)***
King & Arthur v. Thomas McKenna Ltd & Anor [1991] 2 QB 480 ***(foll)***
MCIS Insurance Bhd v. Associated Cover Sdn Bhd [2001] 2 MLJ 561 ***(refd)***
Mohamed Ibrahim [1963] MLJ 32
Ong Guan Teck & Ors v. Hijjas [1982] CLJ 31; [1982] CLJ (Rep) 616 HC ***(refd)***
Re Hopper [1867] 1 Lr2 QBE 367 ***(foll)***
Sharikat Pemborong Pertanian and Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210

Legislation referred to:
Arbitration Act 1952 (Revised 1972), s. 13(1), 21(2), 24(1), (2)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 623

For the plaintiff - M Nagarajah (Sherene Lee); M/s Shook Lin & Bok
For the 1st defendant - GH Khoo (LT Kua); M/s Skrine
For the 2nd defendant - M Pathmanathan; M/s M Pathmanathan & Co

Reported by Suresh Nathan

JUDGMENT

Raus Sharif J:
By way of originating motion in encl. 1, the plaintiff applied, *inter alia*, for the following orders:

a) that paras 1.1 to 1.1.3 of the order for directions by the arbitrator dealing with the issue of contribution of appointment of liability ('the first order') and published to the plaintiff, the first defendant and second defendant on 14 February 2003, be set aside pursuant to s. 24(2) of the Arbitration Act 1952 (Revised 1972);

b) that the further order for directions by the arbitrator made on 19 February 2003 dealing with the first order and published as para. 3 therein ('the second order') to the plaintiff, the first defendant and the second defendant on 20 February 2003 be set aside pursuant to s. 24(2) of the Arbitration Act 1952 (Revised 1972).

The facts leading to the plaintiff's application are as follows: The parties to this application are parties to the current arbitration proceedings which was instituted on 27 September 1999. The second defendant is the claimant in the arbitration and the plaintiff and the first defendant are the respondents. The plaintiff and the first defendant are consulting engineers, whose professional services had been engaged by the second defendant pursuant to an agreement for consulting services dated 12 October 1992. By art. 1 of the agreement, the plaintiff and the first defendant agreed that they would be jointly and severally liable to the second defendant. By art. 4.07 of the agreement, the parties had agreed to refer to any question, dispute or difference that might arise in relation to the agreement to arbitration. Disputes and differences, in fact did arise between the parties. The second defendant invoked art. 4.07 of the agreement and referred the same to arbitration.

During the arbitration proceedings, the plaintiff served a notice dated 17 September 2002 on the first defendant claiming contribution and/or indemnity in respect of the sums claimed by the second defendant, which the arbitrator may find in the second defendant's favour having regard to the first defendant's scope of responsibility under the agreement.

By reason of the first defendant's assertion that the arbitrator lacks the jurisdiction to adjudicate on the issue of contribution in the arbitration proceedings, the plaintiff by way of an Originating Motion No. R1-25-121-2002 applied to the High Court for a declaration that the arbitrator was vested with the jurisdiction. By an order of the High Court made on 10 January 2003, by Abdul Hamid bin Said 'J', it was declared that the arbitrator had the jurisdiction to decide on the issue of contribution and/or indemnity between the plaintiff and the first defendant. The first defendant had appealed against the said order to the Court of Appeal. The appeal is still pending.

As the result of the High Court Order dated 10 January 2003 and the first defendant's appeal, a meeting was fixed on 11 February 2003, for the arbitrator to give his directions on the conduct of the arbitration proceedings. At the said meeting, upon hearing and considering brief submissions from the parties, the arbitrator directed *inter alia* that the issue of contribution to be heard after an award in favour of the second defendant and that supplementary submissions and evidence on the issue of contributions may be given at the same hearing. The learned arbitrator reduced the said order into writing in a letter to the parties dated 14 January 2003 (the first order) which *inter alia* reads as follows:

1. Pursuant to the meeting held on 11th February, 2003, I hereby held as follows:

1.1. ISSUE OF CONTRIBUTION OR APPORTIONMENT OF LIABILITY

1.1.1. This issue shall be dealt with after award has been made on the claimant's claims and respondents' counterclaim.

1.1.2. Supplementary submissions shall be made by the respondents at a date to be fixed after the above mentioned awards. Such supplementary submissions shall be limited only to the issue of contribution/apportionment of liability.

1.1.3. Respondents may recall any witness or call new witnesses to give evidence on this issue.

At the commencement of the arbitration on 19 February 2003, the plaintiff objected to the first order made by the arbitrator for holding that the arbitration proceedings to be split into two different and separate proceedings. Upon hearing and considering full submissions by the plaintiff, the arbitrator decided to maintain his directions on the issue of contribution in the first order. This was confirmed in writing in a letter dated 20 February 2003 to the parties which *inter alia* reads as follows:

3. ORDER FOR DIRECTIONS DATED 14TH FEBRUARY 2003

Order for directions of 14th February 2003 para 1.1. on Issue of Contribution or Apportionment of Liability remain unchanged.

Thus, it is the plaintiff's contention that the arbitrator has misconducted himself in making and publishing the first and second order and seeks to set aside both these orders pursuant to s. 24(2) of the Act. The grounds for the plaintiff's contention are as follows:

(a) the arbitrator has misconducted himself in that he has declined his jurisdiction as per order of the High Court dated 10th January, 2003 which declared that the arbitrator is vested with the jurisdiction to adjudicate on the issue of contribution or apportionment in the arbitration procedure;

(b) there are errors of law appearing on the face of the first order and second order resulting in a substantial miscarriage of justice to the plaintiff, by the act of the arbitrator in holding that the arbitrator proceedings to be split into two different and separate proceedings with the express intention to deliver two distinct and separate Awards in the present arbitration proceedings;

(c) the arbitrator has misconducted himself in that by isolating the contribution issue from being adjudicated in the present arbitration, he has in fact defined himself of the jurisdiction to adjudicate on the contribution issue whereupon his jurisdiction would have ceased upon delivery of the Final Award *vis-a-vis* the second defendant's claim against the plaintiff and the first defendant in the arbitration proceedings.

(d) the arbitrator has misconducted himself by publishing the first order and the second order in that he has proceeded illegally and without jurisdiction to isolate the contribution issue from being adjudicated in the arbitration proceedings and to prevent the contribution issue from being heard before the final award *vis-a-vis* the second defendant's claim against the plaintiff and the first defendant in the arbitration proceedings; and

(e) the arbitrator, in relation to the first order has misconducted himself and failed to observe the principle of natural justice and fairness in that he has proceeded illegally by misjudging on the contribution issue in the first order without inviting any further and proper submission and without acting judicially.

The first defendant, as well as the second defendant in opposing the plaintiff's application states their reasons *inter alia* as follows:

(a) the first order and second order were not awards and therefore, fall outside the ambit and purview of s. 24(2) of the Act;

(b) the first order and the second order were merely interlocutory rulings made for procedural convenience which is within the arbitration's sole discretion and prerogative;

(c) the first order and second order were not in contrary to the court order dated 10 January 2003;

(d) by making the said orders, the arbitrator has neither declined jurisdiction nor misconducted the arbitration proceedings;

(e) even if the first order and second order are interim awards they should not be set aside because:

(i) there is no misconduct by the arbitrator;

(ii) there is no error of law on the face of them;

and

(iii) they were decisions by the arbitrator on a point of law specially referred to him.

Findings

(a) Were The Two Orders "Awards"

To me, the first issue for this court to determine is whether or not the two orders constitute awards under s. 24 of the Act. The word 'award' is not defined in the Act. Nevertheless, it has been judicially considered. In the arbitration between *Mohamed Ibrahim @ Koshis Mohamed* [1963] MLJ 32, the Court of Appeal adopted the following test in determining what constitute an award:

> 'Award' is not a term of art; and it seems to me that the test as to whether an award, be it final or interim, has been made must depend upon whether the order in question amounts to a decision. The principle is any forms of words amounting to a decision of the questions referred will be good as an award. No technical expressions are necessary.

The above case was followed by KC Vohrah J in *MCIS Insurance Bhd. v. Associated Cover Sdn. Bhd.* [2001] 2 MLJ 561 at 567, who said as follows:

> The expression 'interim award' appearing in section 15 is not defined anywhere in the Act. Nor is the expression 'award' defined. Whatever the expression used, whether 'award', 'final award', 'interim award' or 'temporary award' in the context of our law on arbitration, what is important to ascertain is whether it amounts to a decision on the questions referred for determination by the arbitrator, any form of words amounting to a decision of the question referred to will be good as an award.

The plaintiff submits that the two orders clearly and indisputably constitute "awards" within the ambit of the above test. According to the plaintiff, the said "awards" made were final in its terms and in so far as it relates to the issue of how the arbitrator proposes to finally adjudicate on the issue of contribution.

With respect, I am unable to agree. To me, the two orders are not awards but merely directions or interlocutory rulings. The two orders merely specify the order in which issue of contribution has to be decided in the arbitration and therefore, are not susceptible to being set aside. In the recent Court of Appeal case of *Dato' Samsuddin Abu Hassan v. Robert Kokshoorn* [2003] 3 CLJ 1, the Court of Appeal approved and followed the principle established in the English Court of Appeal case of *King & Arthur v. Thomas McKenna Ltd. & Anor.* [1991] 2 QB 480 and held that except for the power to remove an arbitrator for bias under s. 24(1) any intervention by the court can only occur after an award has been made. The Court of Appeal held that the challenge to a ruling by the arbitrator excluding certain documents was not an award or

interim award but merely an interlocutory ruling which may only be challenged when the final award is handed down. Similarly, in the present case the two orders are not awards but interlocutory ruling, which may open to challenge when the final award is handed down.

The arbitrator's powers to make such directions is implied in s. 13(1) of the Act which provides as follows:

> ... every arbitration agreement shall ... be deemed to contain a provision that the parties to the references shall ... **do all things which,** during the proceedings on the reference, the **arbitrator may require**. (emphasis added).

Thus, in the present case, until the first order, the issue in the arbitration proceeding was limited to the second defendant's claim in contract and tort against the plaintiff and the first defendant. However, with the expanded scope perhaps to the issue of contribution between the plaintiff and the first defendant, it was incumbent on the arbitrator to give his directions on the procedural aspects of how the new issue would be dealt with. Since the issue of contribution will only arise if and after a finding of liability against the plaintiff and the first defendant, I am of the view that it stands to reason that the issue should be reserved until there is a finding of liability against the plaintiff and the first defendant and the extent of the liability. Thus, only after liability and quantum are determined can the issue of contribution be determined. To me, the procedure adopted will allow the arbitrator to better and sharply focus first on the primary issue of whether or not the plaintiff and first defendant are liable to the second defendant.

It is settled law that an arbitrator is the master of procedure to be followed in an arbitration and he has complete and unfettered discretion in the matter. The House of Lords in the case of *Bremer Vulkan v. South India Shipping Corporation* [1981] 1 All ER 289 (HL) held that:

> By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference to any particular procedural rules, the parties make the arbitrator the master of the procedure to be followed in the arbitration ... he has complete discretion to determine how the arbitration is to be concluded from the time of his appointment to the time of his award, so long as the procedure be adopted does not offend the rule of natural justice.

Thus, to me the two orders were procedural rulings and that the arbitrator has full control. Being procedural rulings, this court has no jurisdiction to supervise. The Court of Appeal in *Dato' Shamsuddin*'s case decided that:

> With the exception of an application to remove an arbitrator pursuant to section 24 of the Act, the Court has no power to supervise arbitration or review interlocutory decisions of an arbitration or order that the arbitrator should reconsider a pre-award ruling.

At p. 8 of the case, Abdul Hamid Mohamad JCA (now Federal Court Judge) in dealing with the arbitrator's ruling on admissibility of documents held as follows:

> ... to allow such a ruling to be referred to Court and remitted back to the arbitrator under section 23 of he Act would slow down arbitration proceedings and defeat the whole purpose of arbitration. In an arbitration proceeding, as in a trial, an arbitrator or a judge would have to make numerous rulings along the way regarding admissibility of evidence, documentary or otherwise whether a question may be allowed to be asked or not and so on. To allow every such ruling to be referred to court and remitted back to the arbitration would seriously delay the proceeding before the arbitrator, what more, as in this case, where the decision of the High Court is appealed further and where there was a number of such application and further appeals. It would also increase costs.

The same principle is applicable in the present case. In fact, the two orders as directed by the arbitrator, that the issue of contribution to be heard after the second defendant's claim against the plaintiff and the plaintiff would save time and cost for all parties. This is because only if the arbitrator delivered an award in favour of the second defendant would it be necessary to hear the issue of contribution.

(b) Misconduct

Even if the first and second orders are not procedural direction but awards as contended by the applicant, I am of the view that there are no grounds for setting them aside. This court derives its statutory jurisdiction to set aside arbitral awards from s. 24(2) of the Act which reads as follows:

> Where an arbitrator or umpire has misconducted himself or the proceedings or an arbitration or award has been improperly procured, the High Court may set the award aside.

Raja Azlan Shah J (now his Majesty the Sultan of Perak) in *Sharikat Pemborong Pertanian and Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210 at p. 211 set out what constitute arbitrator's misconducts:

> 'Misconduct' is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties, which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes irregularity

> of action, which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated ... the plaintiff's complaint is sustainable only if the failure to do so had occasioned some irregularity causing miscarriage of justice that is apparent on the face of the award.

The above passage has been cited with approval by the Court of Appeal in *Hartela Contractors Ltd. v. Hartecon JV Sdn. Bhd. & Anor.* [1999] 2 CLJ 788 and *Future Heritage Sdn. Bhd. v. Intelek Timur Sdn. Bhd.* [2003] 1 CLJ 103. Gopal Sri Ram JCA at p. 796 in *Hartela Contractors* held that the jurisdiction to set aside an arbitrator's award whether at common law or under stature is one that should be exercised with great care and with proper sense of responsibility." In *Future Heritage*, Richard Malanjum JCA in considering s. 21(2) quoted Hashim Yeop Sani J, in *Ong Guan Teck & Ors. v. Hijjas* [1982] CLJ 31; [1982] CLJ (Rep) 616:

> The language of s. 24(2) would seem be rather narrow and limited. In other words, the power of the High Court to set aside an award is restricted to cases where some form of dishonesty is shown.

Thus, in essence, the High Court's jurisdiction to set aside an arbitrator's award for misconduct under s. 24(2) is very limited and only to be exercised sparingly, that is, as such in the event of miscarriage of justice in which there is failure to observe the rules of natural justice or an appearance of bias, partiality, illegality or dishonesty. None of these circumstances justifying setting aside the two orders are present in this case.

(c) Refusal To Be Bound By The Court Order Dated 10 January 2003

It was submitted by the plaintiff that by splitting the current arbitration proceedings into two and by isolating the contribution issue from being adjudicated in the current arbitration, the arbitrator had deliberately refused to be bound by the court order dated 10 January 2003 and had acted in a manner which directly contravened the operation of the said court order. With respect, I am of the view that the directions of the arbitrator were not contrary to the said court order. The said court order only declared that the arbitration was vested with the jurisdiction to decide the issue of contribution between the plaintiff and the first defendant. It does not specify in what order or manner in which the issue of contribution must be decided in the arbitration.

(d) Errors Of Law On The Face Of The Two Orders

The plaintiff alleges that there are errors of law appearing on the face of the first and second order resulting in substantiated miscarriage of justice by the arbitrator by holding two separate proceedings and delivering two separate awards. But to me, there are no errors of law on the face of the orders. The Court of Appeal in *Future Heritage* dealt in detail of the common law jurisdiction to set aside awards on error of law on the face of award. The Court of Appeal referred to *Halsbury's Laws of England* (4th edn) para 623 which states:

> An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, the error of law on the face of the award, must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

At p. 113 of *Future Heritage*, the Court of Appeal held that:

> ... the common law as a very limited exception, grudgingly allowed a court to intervene and set aside an award on the face of which there appeared an error of law.

At the same page, the court also held that the breadth of this limited common law jurisdiction is as explained by Lord Dunedin in *Chamsey Bhara Co v. The Jivray Ballou Spinning & Weaving Co. Ltd.* [1923] AIR PC 66:

> An error of law on the face of the award means ... that you can find in the award ... some legal proposition which is the basis of the award and which you can say is erroneous. It does not mean that if in a narrative or reference is made to a contention of one party that opens the door to seeing first what that contention is and then going to the contract on which the parties rights depend to see if that contention is sound.

The plaintiff alleges that there are errors of law appearing on the face of the two orders resulting in a miscarriage of justice by the arbitrator in holding two separate proceedings and delivering two awards.

With respect, I am unable to agree. Whilst the plaintiff alleges that the arbitrator has misconducted the proceedings and declined jurisdiction, the plaintiff has not shown that the impugned order has in any way prejudiced the plaintiff's case or caused the plaintiff any injustice. Save for barely alleging at para. 20 of encl. 2 that the orders result in a substantial miscarriage of justice to the plaintiff, the plaintiff has not demonstrated how this can be so.

Conclusion

It is well settled that the court's general approach to arbitrations is a "hands-off attitude unless there has been something radically wrong and vicious in the proceeding". (Per Cockburn CJ in *Re Hopper* [1867] 1 Lr2 QBE 367). This principle has been adopted and affirmed by the Malaysian courts, that the arbitrator has, in general, a discretion as to the manner in which the arbitration is to be conducted. The court will not review the arbitrator's discretion, provided he acts within his authority and according to the principles of justice and behaves fairly to each party. On the facts of this case, and for the aforesaid reasons, I am restrained from exercising my discretion to grant the orders sought by the plaintiff as per encl. 1. Accordingly, the plaintiff's application is dismissed with costs.